International Brotherhood of Painters and Allied Trades, AFL-CIO *and* Delcon, Inc. and International Association of Heat and Frost Insulators and Asbestos Workers Local 17. Case 13-CD-322

12 September 1983

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Delcon, Inc., herein called the Employer, alleging that International Brotherhood of Painters and Allied Trades, AFL-CIO, herein called the Respondent or Painters, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by International Association of Heat and Frost Insulators and Asbestos Workers Local 17, herein called Local 17 or the Intervenor.

Pursuant to notice, a hearing was held before Hearing Officer Melvyn P. Basan on 4 and 8 February 1983. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer and Local 17 filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

John Ginder, president and chief executive officer of Delcon, testified, and we find, that the Employer, a Nevada corporation with its principal place of business in Illinois, is engaged in the business of industrial painting and fireproofing. During the past year, the Employer purchased and received materials from outside the State having a value in excess of $50,000. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Painters and Local 17 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

Delcon Inc., the Employer, was awarded a contract by Midwest Steel involving the installation of fire-stops and the spray application of Vimasco, a water-based emulsion fireproofing material, over several hundred feet of metal trays containing electrical cables. The work is being performed by two employees of Delcon, both of whom are journeymen in the Painters.

Delcon was established in 1981 as a wholly owned subsidiary of Luse-Stevenson Co. for the purpose of performing painting and fireproofing work. Luse-Stevenson is a contractor in the insulation business which has had successive contracts for many years with Local 17. Local 17 takes the position that Delcon was formed to permit Luse-Stevenson to evade its contract with Local 17; that Delcon and Luse-Stevenson are a single employer; and that all spraying of fireproofing material performed by employees of Delcon on the Midwest Steel job or any other job is covered by its contract with Luse-Stevenson and therefore belongs to employees represented by it. Delcon and the Respondent contend that Delcon and Luse-Stevenson are legally distinct entities engaged in different businesses, and that employees of Delcon represented by the Painters are entitled to perform this work.

In December 1982, the business agent for Local 17, Jack Payne, telephoned Duane Luse, the sole director of Luse-Stevenson and Delcon, to tell him that Delcon had just been awarded the Midwest Steel fireproofing job and that he expected Local 17 members to do the work. Luse informed Ginder, president of Delcon, of Local 17's demands. Ginder in turn contacted the Painters representative and told him of the situation. The Painters replied that it would not allow its contract to be violated and followed this with a letter to Delcon threatening to picket if the work was reassigned to employees represented by Local 17.

B. *The Work in Dispute*

The work in dispute involves the installation of fire-stops and the spray application of Vimasco, a fireproofing material, on electrical cables at the Midwest Steel plant in Portage, Indiana.

C. *The Contentions of the Parties*

The Employer contends there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the work in dispute should be awarded to employees represented by the Painters based on the collective-bargaining agreement, industry practice, relative skills, efficiency of operation, and employer preference. The Employer contends that it was not established by Luse-Stevenson to avoid the latter's contractual obligations with Local 17. Rather, it was established to respond to the growing painting/fireproofing market which is distinct from the insulating line of business in which Luse-Stevenson had historically engaged. But, according to the Employer, even if it were an *alter ego*, or a new department, of Luse-Stevenson, Section 8(b)(4)(D) comes into play simply by virtue of the fact that two groups of employees are disputing a work assignment.

Respondent Painters contends that the work is covered by its contract with Delcon and has been properly assigned to Delcon employees represented by the Painters.

Local 17 moves to quash the notice of hearing, asserting that Luse-Stevenson Co. has set up its wholly owned subsidiary in an attempt to improperly transfer bargaining unit work. Thus, this is not a jurisdictional dispute but a contractual dispute.[1] Local 17 contends there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated, especially since there "has been no threat in this case. Rather, there has been only orchestrated maneuvering. . . ."

Assuming, *arguendo*, that the Board finds reasonable cause to believe the Act has been violated, Local 17 contends that its contract with Luse-Stevenson covers the disputed work, Luse-Stevenson employees have the skills to do the work, and area and industry practice favor an award to employees represented by Local 17.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied (1) that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and (2) that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

As to (1), above, the Intervenor contends that Respondent's threat to picket was not a real threat, but a collusive scheme concocted to invoke the Board's jurisdiction under Section 10(k). Secondly, Local 17 charges that, in an effort to subvert bargaining unit work, i.e., to transfer bargaining unit work out of the unit, Luse-Stevenson formed its alleged *alter ego*, Delcon, and Delcon entered into a sweetheart arrangement with the Painters. Thus, it argues, the dispute is not jurisdictional but rather a claim to work under the contract. We find no merit in such contentions. As to the legitimacy of the threat, there is no evidence in the record to support Local 17's contentions.[2] As to whether the dispute is jurisdictional, it is clear that there are two groups of employees disputing a work assignment and one has threatened the Employer with picketing in the event the assignment of the work is changed. That is a jurisdictional dispute. The fact that a claim to work is based upon contract does not alter the character of the dispute.

As to (2), above, the parties have not agreed upon a method for the voluntary adjustment of the dispute. Delcon is not a party to any contract, or a member of any association which has a contract, which contains an agreement to resolve disputes through the Impartial Jurisdictional Disputes Board (IJDB), or through any other impartial means. Nevertheless, the Painters has filed a complaint with the IJDB seeking an order from that body directed to Local 17 to drop its claim for the work. Local 17, at the same time, has filed a grievance against Luse-Stevenson for contract violation with its Joint Trade Board, a contractual grievance processing body to which neither Delcon nor the Painters is a party.[3]

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[1] In support of this contention, Local 17 cites *Plumbers Local 36 (Weinheimers, Inc.)*, 219 NLRB 1016 (1975).

In *Weinheimers*, a plumbing contractor, which had had a contract with Local 36 for many years, established two new companies as plumbing contractors and went out of this aspect of the business. The new companies had no employees who performed plumbing work. Rather, they subcontracted the labor to nonunion contractors. Local 36 engaged in a work stoppage against Weinheimers' nonresidential plumbing operations, arguing that Weinheimers established the new companies to avoid its contractual obligations to the union. The Board agreed that this was not a jurisdictional dispute but, rather, a dispute over an allegedly improper transfer of unit work.

Weinheimers is distinguishable and inapposite to the instant case. Most importantly, in *Weinheimers*, there were no competing claims for the work. Here, two groups of employees are clearly vying for the work in dispute. Also, in *Weinheimers*, the new companies performed work that had previously been performed by, and fell squarely in the jurisdiction of, employees represented by Local 36. Here, Delcon's employees, represented by Respondent, are performing work substantially different from that performed by Luse-Stevenson and employees represented by Local 17. Thus, *Weinheimers* holds little relevance to the present dispute.

[2] See, generally, *Broadcast Employees NABET Local 16 (American Broadcasting Co.)*, 227 NLRB 1462, 1464 (1977).

[3] Local 17 has moved for the inclusion in the record of this Joint Trade Board decision rendered against Luse-Stevenson Co. 2 days after the close of the hearing in the instant matter. The Employer opposes this motion on the grounds that it has had no opportunity to show that the decision is entitled to no weight; a 10(k) determination takes precedence anyway; and the decision is conclusionary. Nevertheless, we hereby grant this motion to include this decision in the record. Having read and considered the decision, we find it relevant, but hardly binding on the Board, or the parties for that matter, as neither Respondent nor the Employer was a party to that proceeding. Further, the Board has long held that it will not accord significant weight to an award, like this one from the

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Accordingly, we find on the basis of the entire record that there is reasonable cause to believe that the Respondent violated Section 8(b)(4)(D) of the Act and that the dispute is properly before the Board for determination under Section 10(k) of the Act. The Intervenor's motion to quash the notice of the 10(k) proceeding, therefore, is denied.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[4] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[5]

The following factors are relevant in making the determination of the dispute before us:

1. Certification and collective-bargaining agreements

Neither the Respondent nor the Intervenor has been certified by the Board to represent the employees of Delcon, Inc., and thus certification is not a factor favoring either group of employees. However, the Respondent is a party to a collective-bargaining agreement with the Employer. The Respondent is also party to five specialty agreements with the Painters Union, including an agreement specifically covering fireproofing work. Article II, section 2, of the fireproofing agreement defines the scope of the covered work as follows:

> Work covered by this Agreement shall include all work coming within the work jurisdiction of the Brotherhood, as presently set forth in its Constitution, to be performed by the Employer, including, but not limited to specialty coatings, such as Albi Clad, Chartek, Pyrocrete, Thermo-lag, Silicone Foam and similar fire retardant coatings in accordance with the specifications of the manufacturer and all work pertaining to: surface preparation, such as sandblasting, wire brushing, buffing, grinding, steam solvent or detergent cleaning; the removal of existing coatings, the application of primers; the installation of wire netting or wire mesh systems; the operation of all tools and equipment, including but not limited to brushes, manual and pressure rollers, squeegees, lamb wool applicators, trowels, pressure guns and other miscellaneous hand tools and power driven machines; the required scaffolding and rigging; the clean-up of all overspray and the handling of all materials in conjunction with the above work process.

Vimasco is a fire retardant coating within the meaning of section 2 of this specialty agreement. It is being applied with pressure guns, an operation clearly covered by the fireproofing agreement.

On the other hand, the description of Local 17's jurisdiction in its collective-bargaining agreement with Luse-Stevenson covers the installation of insulation. The pertinent section of this collective-bargaining agreement provides:

> The work of the bargaining unit shall include the fabrication, assembling, molding, handling, erection, spraying, pouring, mixing, hanging, preparation, application, adjusting, alteration, repairing, dismantling, reconditioning, testing and maintenance of Heat or Frost Insulation. . . .

Inasmuch as the Painters agreement with Delcon specifically covers what has been estimated as 90 percent of the work in dispute (i.e., spray application of fireproofing material), and since Local 17's contract covers none of this work, we find that the collective-bargaining agreements favor an award to the employees represented by the Painters.

2. Relative skills

The work involved consists primarily of spraying fireproofing material over various surfaces. The spraying of Vimasco requires a high degree of skill. The coating must be applied at a one-eighth-inch thickness in order to achieve its necessary fire rating. The equipment used is pump spray equipment designed primarily for spray painting, which is also used for painting work performed on other jobs by employees of Delcon. Delcon's president estimates that it takes 5 years for a worker to become completely proficient in the use and repair of this equipment. Delcon's lead painter has many years of experience applying coatings with spray equipment.

When Luse-Stevenson attempted to perform such work with its own employees in 1980, the results were unacceptable, and Local 17 was unable to provide employees with appropriate skills from among its own members. Instead, an employee was hired through a sister local of Local 17 for that one job. The work normally performed by Luse-Stevenson's employees represented by Local 17 consists of cutting and installing insulation in the form of sheets, rolls, or blocks of insulating material.

Joint Trade Board, that fails to explicate the factors upon which it is based. See *Plasterers Local 394 (Warner Masonry, Inc.)*, 220 NLRB 1074, 1075–76 (1975).

[4] *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961).

[5] *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

Accordingly, we find that the factor of relative skills favors awarding the work to employees represented by the Painters.

3. Industry practice

Evidence was presented by the Employer that its competitors bidding for fireproofing work hire mostly employees represented by the Painters. The Painters also produced evidence that a similar dispute with a sister local of Local 17 was decided in favor of the Painters by the predecessor to the IJDB in 1972. Little evidence was presented that insulation contractors perform fireproofing work. In view of the foregoing, industry practice favors an award of this work to employees represented by the Painters.

4. Employer assignment and preference

Delcon has assigned the disputed work to its painters and is satisfied with their work. For this reason, and because Delcon currently employs no one who is represented by Local 17, Delcon prefers that the work be performed by employees represented by the Painters. Delcon's current assignment and preference thus favor the award of the work to these employees.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by the Painters are entitled to perform the work in dispute. We regard as significant the relevant collective-bargaining agreement; employees represented by the Painters have been assigned the fireproofing work pursuant to their collective-bargaining agreement with Delcon. We also regard as significant industry practice, relative skills of the competing employees, and employer preference.

In making this determination, we are awarding the work in question to employees who are represented by International Brotherhood of Painters and Allied Trades, AFL-CIO, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

Employees of Delcon, Inc., Portage, Indiana, who are currently represented by International Brotherhood of Painters and Allied Trades, AFL-CIO, are entitled to perform installation of firestops and the spray application of Vimasco on electrical cables at the Midwest Steel plant located in Portage, Indiana.